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DEC 20 2004

OFFICE OF PETITIONS

In re Application of :
Clauberg, et al. :
Application No. 09/935,924 : **ON PETITION**
Filed: August 23, 2001 :
Attorney Docket No. 71348 :

This is a decision on the petition to revive under 37 CFR 1.137(a), or in the alternative under 37 CFR 1.137(b), filed July 19, 2004.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **GRANTED**.

The above-identified application became abandoned for failure to timely file a reply in response to the final Office action mailed November 3, 2003. This Notice set a shortened statutory period for reply of three months. No extensions of time under 37 CFR 1.136(a) were obtained. No reply having been received, the above identified application became abandoned on February 4, 2004. A Notice of Abandonment was mailed on May 11, 2004.

Petition Under 37 CFR 1.137(a):

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(1); and (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable. The instant petition lacks item (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.²

With regards to item (3), petitioner states that he did not receive the November 11, 2003 final Office action. To establish nonreceipt of an Office action, a petitioner must: 1) include a statement that the Office action was not received; 2) attest to the fact that a search of the file jacket and docket records indicates that the Office action was not received; and 3) include a copy of the docket record where the nonreceived Office action would have been entered had it been received and docketed.³ A proper docket report consists of a "docket record where the nonreceived Office action would have been entered had it been received and docketed."⁴ "For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket record showing **all** replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted..."⁵

Here, the docket report submitted only contains those papers docketed in the instant application. There is no showing of record that precludes the possibility that the November 11, 2003 final Office action was erroneously docketed in another application. Petitioner has not provided a showing of the training of the legal assistant assigned to the above-identified application.

The petition fee of \$110 has been charged to petitioner's deposit account, as authorized.

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

³ See MPEP 711.03(c) (II).

⁴ MPEP 711.03(c) (II) (emphasis added).

⁵ Id (emphasis added).

Petition Under 37 CFR 1.137(b):

With the instant petition, petitioner made a proper statement of unintentional delay, paid the petition fee, and submitted the required reply in the form of a Notice of Appeal (and fee).

The petition fee of \$1,330 has been charged to petitioner's deposit account, as authorized.

Please be advised that the two month period for filing an appeal brief in triplicate (accompanied by the fee required by 37 CFR 1.17(c)) runs from the date of this decision.

The application file is being returned to Group Art Unit 2851 to await for applicant's submission of the appeal brief in triplicate.

Telephone inquiries related to this decision should be directed to the undersigned at (571)272-3207.

A handwritten signature in cursive script, appearing to read "Cliff Congo".

Cliff Congo
Petitions Attorney
Office of Petitions

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